

# Duke University

---

*Title IX Sexual Harassment Training*

August 31, 2020

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

# Training Requirement

- **Individuals with “Title IX roles” must receive training on:**
  - Definition of sexual harassment in § 106.30,
  - The scope of the recipient’s education program or activity,
  - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and
  - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

# This Training

**General Title IX** requirements for participants in grievance process

*(Duke-specific training to follow!)*

*The statute, the final rule, what it all means*

# THE FOUNDATION

# The Statute

No person in the United States shall, on the basis of sex,

- be excluded from participation in,
- be denied the benefits of, or
- be subjected to discrimination

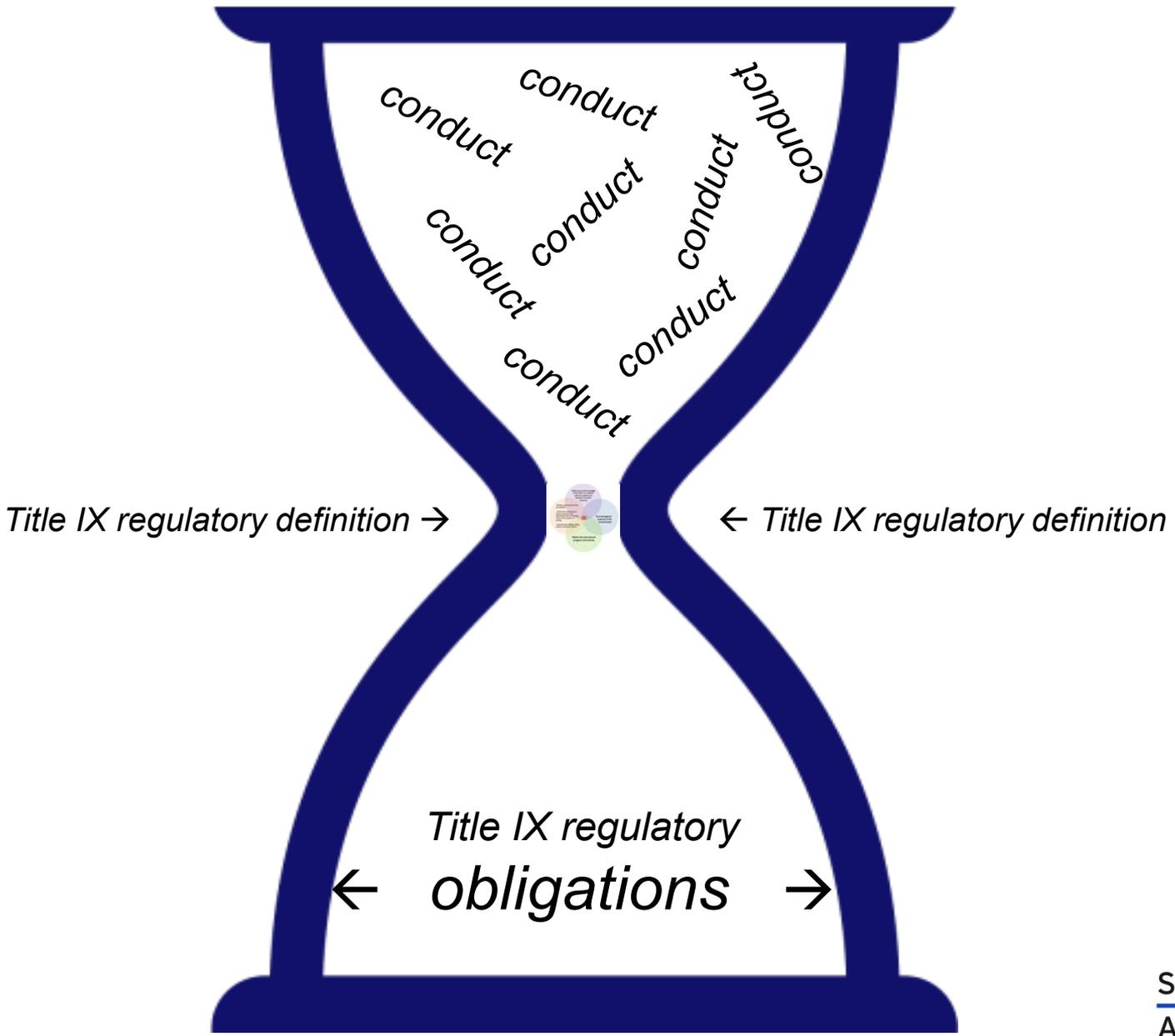
under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

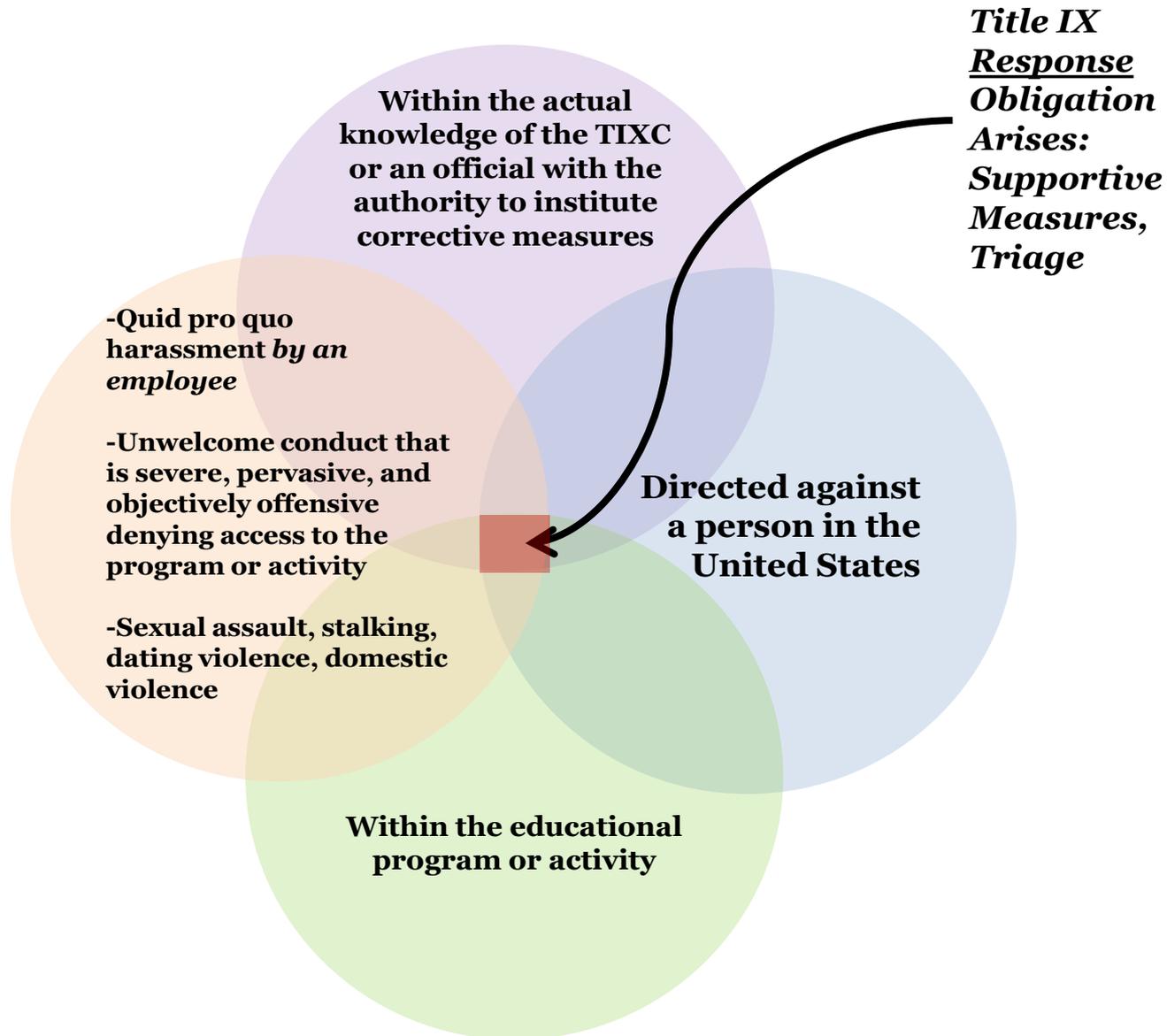
# The Final Regulations

- Final rule released by ED informally on its website on May 6, 2020
  - (2000+ double-spaced pages)
- Published in the Federal Register on May 19, 2020 (34 CFR Part 106)
  - (550+ tight single-spaced pages)
- Effective date: **August 14, 2020**



# The Foundation (#1)

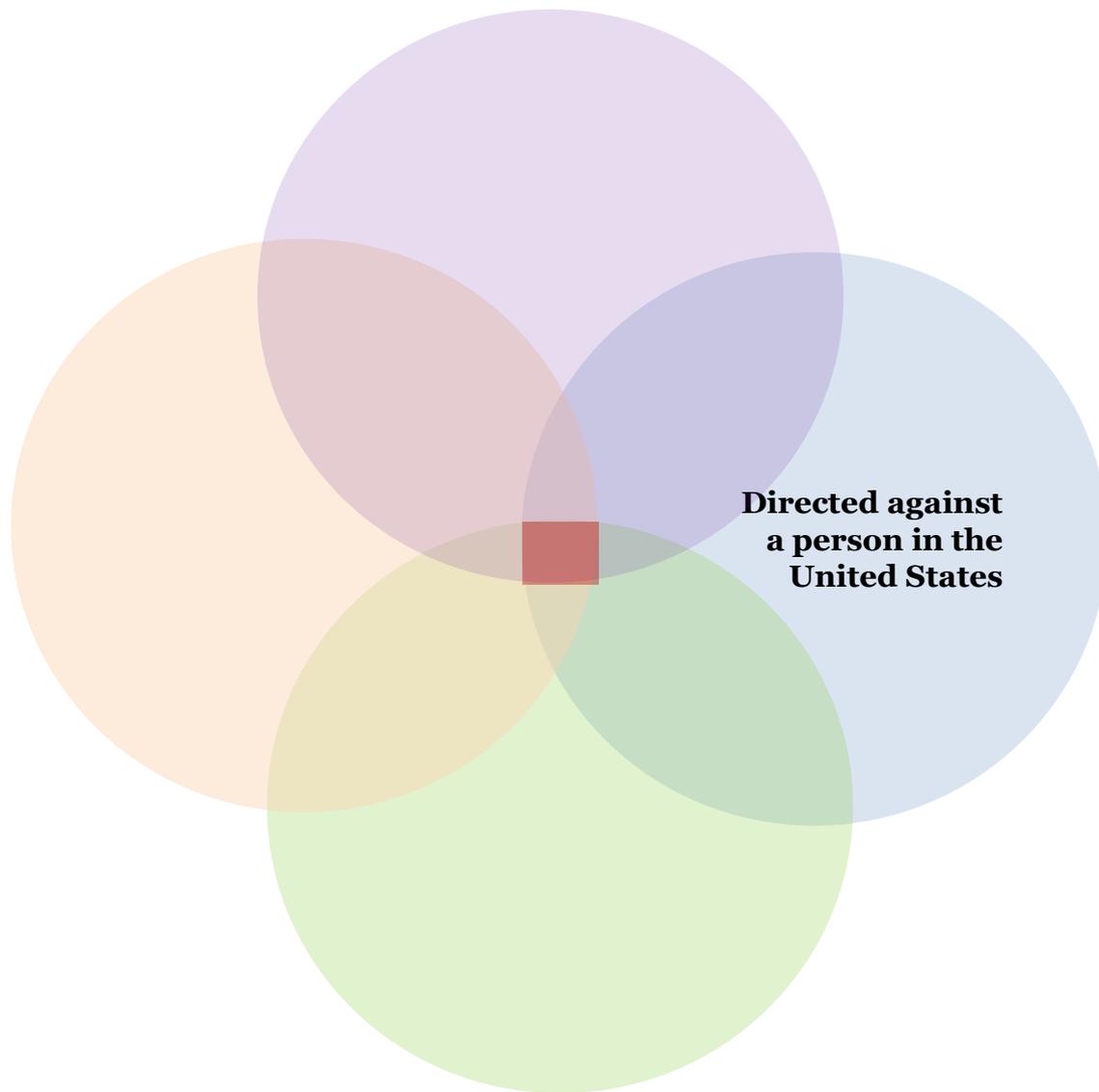
If you have actual knowledge of sexual harassment that occurred in your education program or activity against a person in the United States, then you must respond promptly in a manner that is not deliberately indifferent.

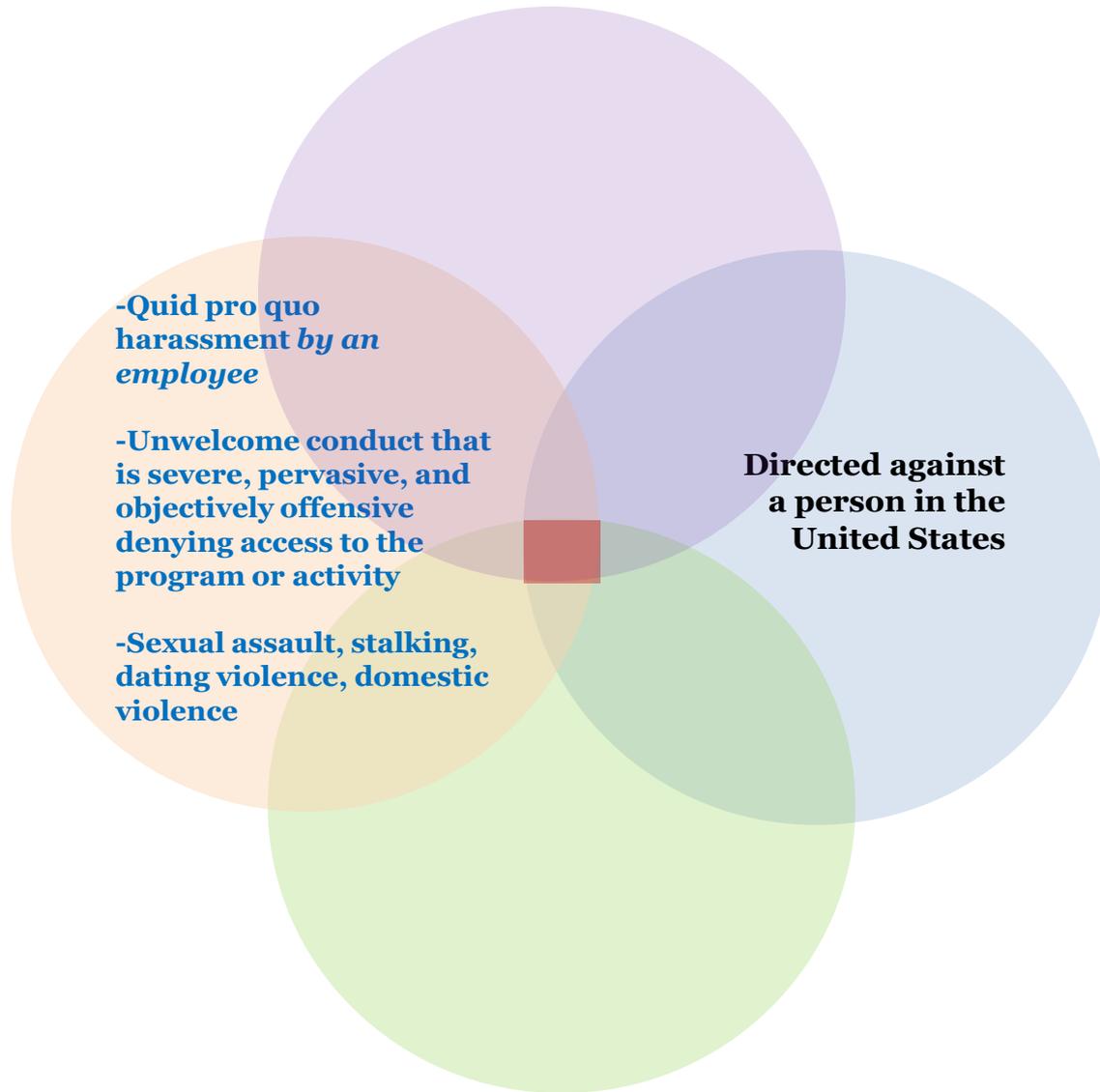


*Scope and Jurisdiction*

# **TITLE IX COVERED CONDUCT**

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>



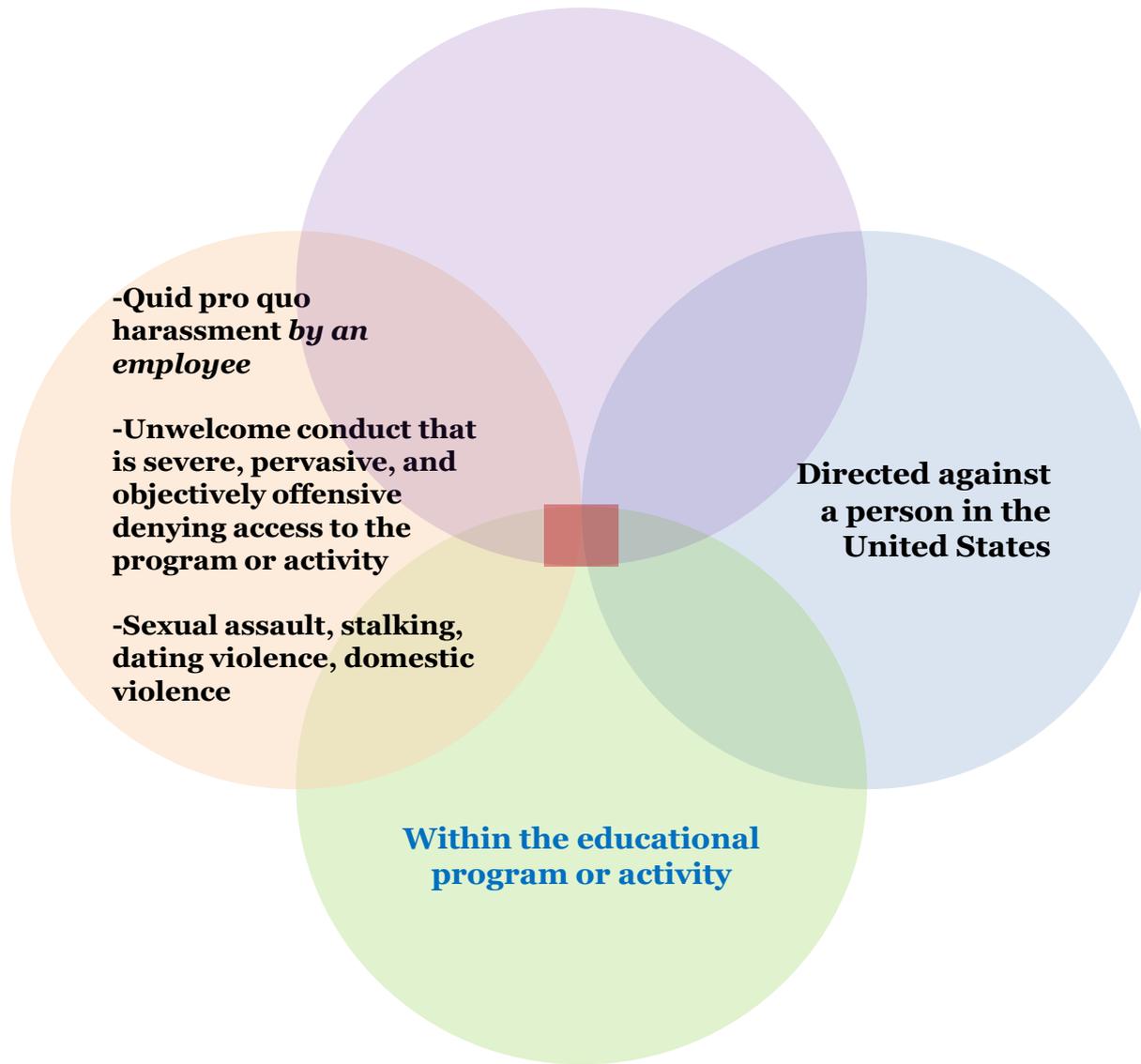


# Scope: Sexual Harassment

**Sexual Harassment** means: conduct *on the basis of sex* that satisfies one or more of the following –

- (i) an **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
- (ii) unwelcome conduct determined by a **reasonable** person to be so **severe, pervasive, \*and\* objectively offensive** that it effectively denies a person equal access to the recipient’s **education program or activity**; or
- (iii) “**sexual assault**” as defined 20 U.S.C. 1092(f)(6)(A)(v), “**dating violence**” as defined in 34 U.S.C. 1229(a)(10), “**domestic violence**” as defined in 34 U.S.C. 12291(a)(8), or “**stalking**” as defined in 34 U.S.C. 12291(a)(30)

§ 106.30



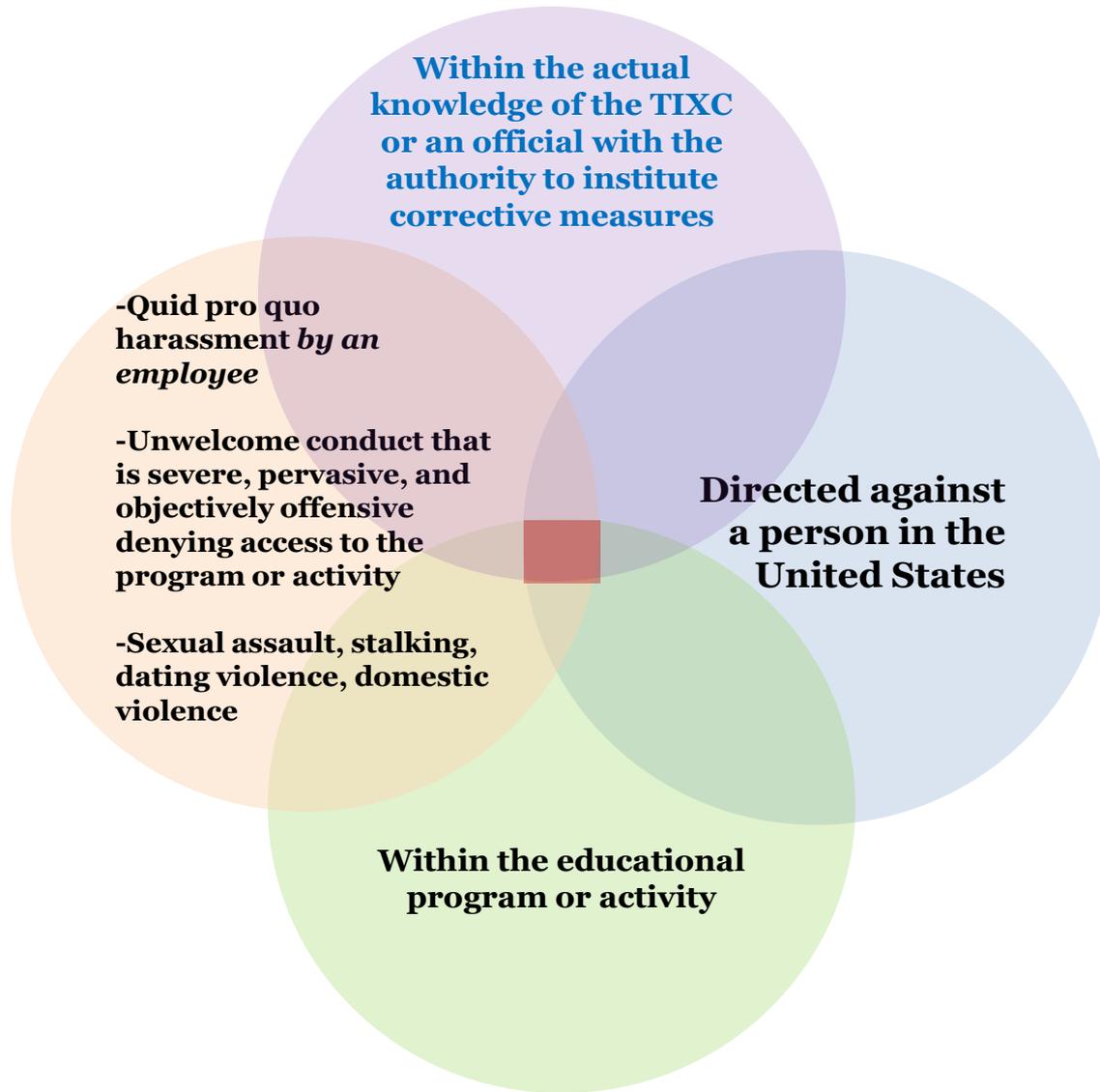
# Jurisdiction

*“Education program or activity” is:*

All operations of the institution, including . . .

- “[L]ocations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and . . . any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”
- **Applies to employees**, *including employee on employee conduct*

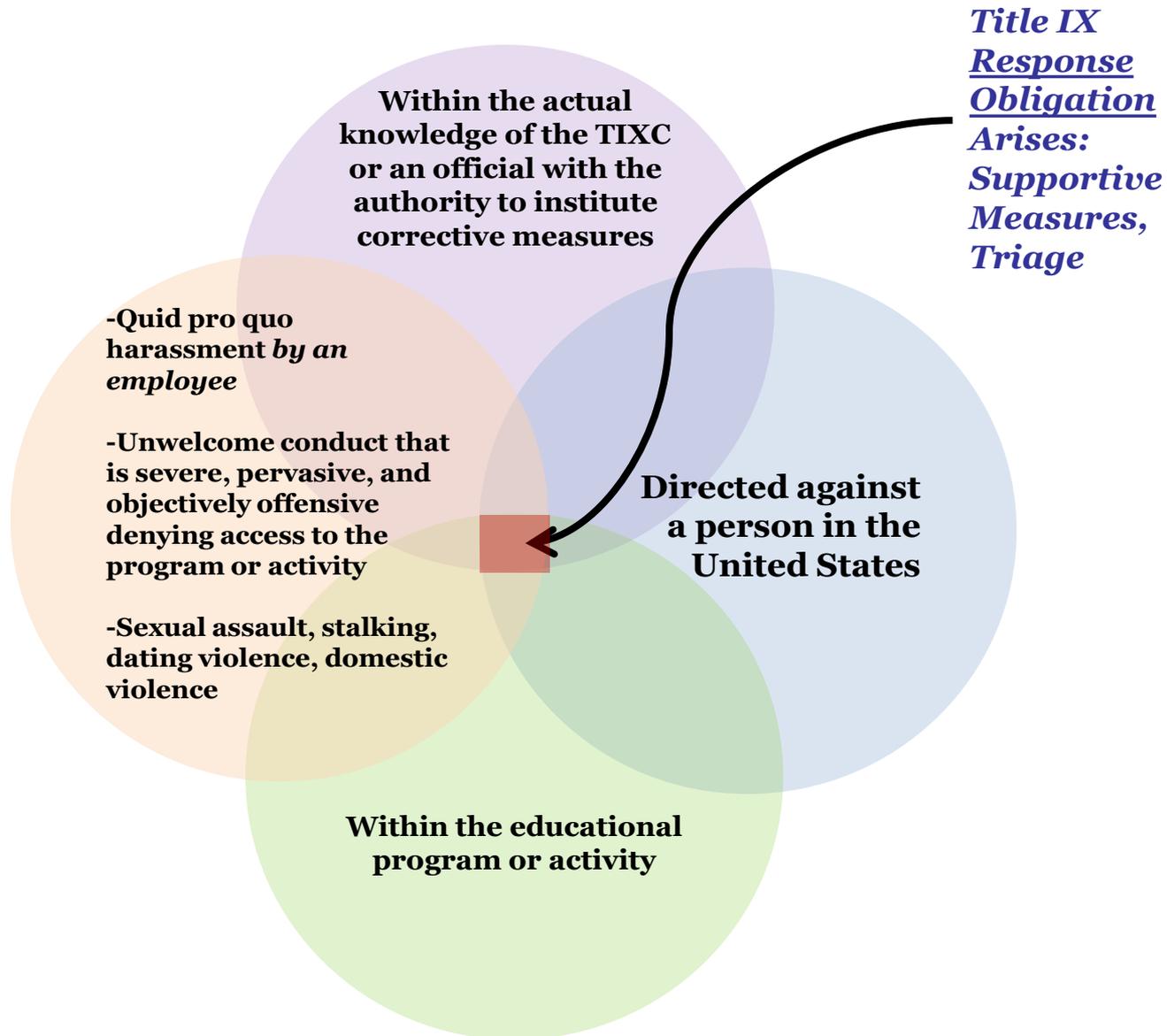
§ 106.44(a)



# Actual Knowledge

“*Actual Knowledge* means notice of sexual harassment or allegations of sexual harassment to a recipient’s *Title IX Coordinator* or any official of the recipient who has the authority to institute corrective measures on behalf of the recipient...”

§ 106.30



# Responding to a Report

Once the institution has actual knowledge of allegations of sexual harassment the Title IX Coordinator must:

- 1. promptly contact the complainant to discuss the availability of supportive measures,**
- 2. consider the complainant's wishes with respect to supportive measures,**
- 3. inform the complainant of the availability of supportive measures with or without the filing of a formal complaint,**  
and
4. explain to the complainant the process for filing a formal complaint.

§ 106.44(a)

# What are Supportive Measures?

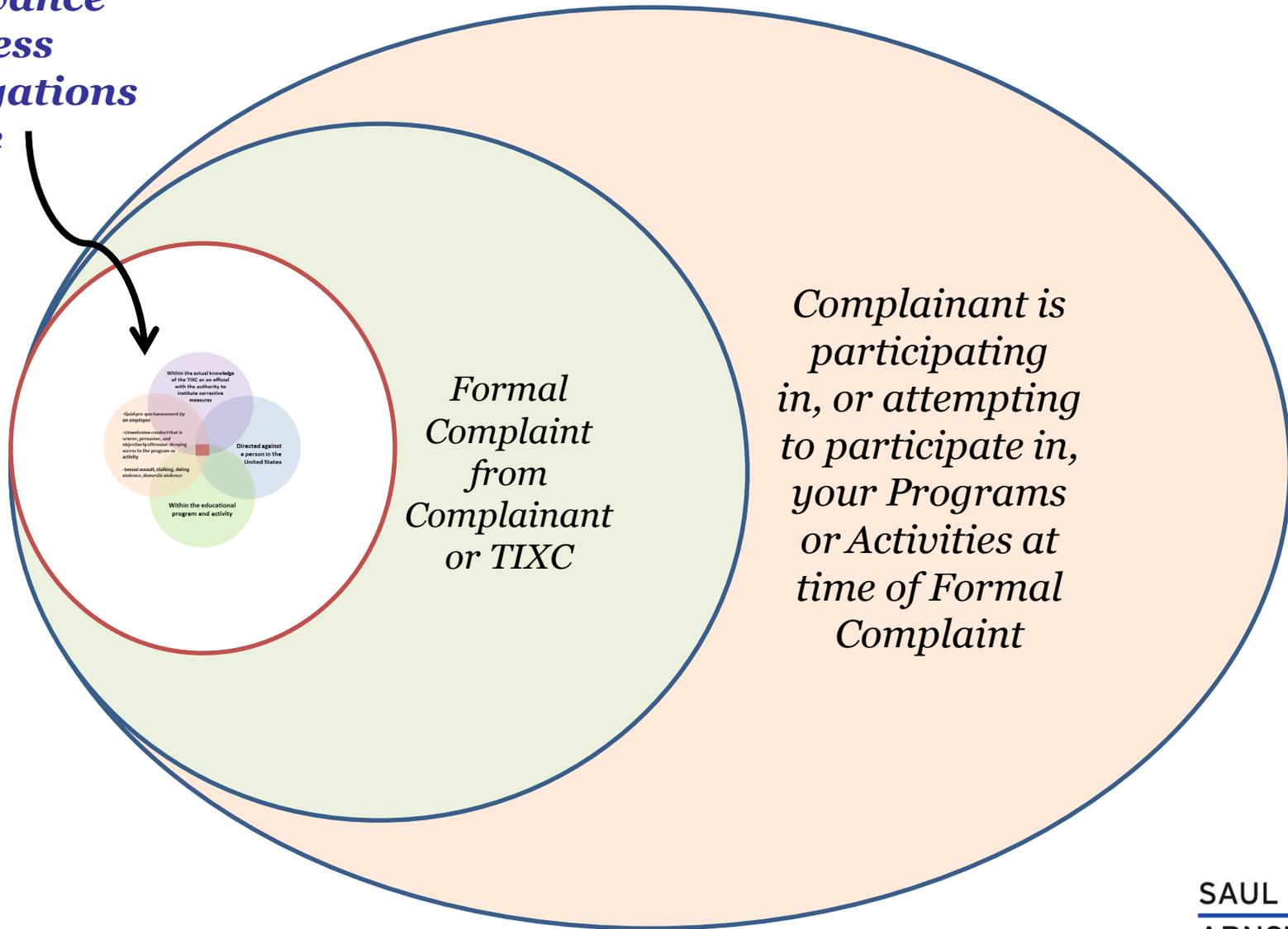
- Non-disciplinary, non-punitive individualized services,
- offered as appropriate, as reasonably available, and without fee or charge,
- to the complainant or the respondent,
- including as designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

§ 106.45(a)(3)

# The Foundation (#2)

If you receive a formal complaint of sexual harassment signed by a complainant who is participating in or attempting to participate in your education program or activity, then you must follow a grievance process that complies with Section 106.45.

**§106.45  
Grievance  
Process  
Obligations  
Arise**



*Training, serving without bias or conflicts of interest*

# **EXPECTATIONS**

# Expectations: Training

- ***Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive training on:***
  - Definition of sexual harassment in § 106.30,
  - The scope of the recipient's education program or activity,
  - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and
  - **How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.**

# Expectations: Bias & Conflicts

Any individual designated as a Title IX Coordinator, investigator, decision-maker, or to facilitate an informal resolution process, must “*not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.*”

§106.45(b)(1)(iii)

# But not advisors. . .

The final regulations impose no prohibition of conflict of interest or bias for advisors

85 FR 30254 n.1041

# Bias: what does it mean?

“Whether bias exists requires examination of the *particular facts* of a situation . . .

. . . and the Department encourages recipients to apply *an objective* (whether a reasonable person would believe bias exists), *common sense approach* to evaluating whether a particular person serving in a Title IX role is biased[.]”

85 FR 30248.

# Bias: what does it mean?

- Treating a party differently on the basis of the party's **sex or stereotypes** about how men or women behave with respect to sexual violence. 85 FR 30238-40.
- Treating any individual differently on the basis of an individual's **protected characteristic**, including sex, race, ethnicity, sexual orientation, gender identity, disability or immigration status, financial ability, socioeconomic status, or other characteristic. 85 FR 30084.

# Impermissible Bias

Making a decision based on the **characteristics** of the parties, rather than based on the **facts**



# What is not defined as bias?

## 1. Outcomes of the grievance procedure

The Department cautions parties and recipients from concluding bias based **solely on the outcome of the grievance procedure.**

“[T]he mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel.”

85 FR 30252

# What is not defined as bias?

## 2. Title IX Coordinator Signs Formal Complaint

When a Title IX Coordinator signs a formal complaint, it does not render the Coordinator biased or pose a conflict of interest.

The Department has clarified that this **does not place the Title IX Coordinator in a position adverse to the respondent** because the decision is made on behalf of the recipient and not in support of the complainant or in opposition of the respondent.

85 FR 30372

# What is not defined as bias?

## 3. Professional/Personal Experiences or affiliations

Not *per se* bias; exercise caution not to apply “generalizations that might unreasonably conclude that bias exists”:

- All “self-professed feminists” or “self-described survivors” as biased against men
  - A male is incapable of being sensitive to women
  - History of working in a field of sexual violence
- Prior work as a victim advocate = biased against respondents
- Prior work as a defense attorney = biased in favor of respondents
  - Solely being a male or female
  - Supporting women’s or men’s rights
- Having a personal or negative experience with men or women

# But consider . . .

Whether a Title IX personnel has a bias and/or conflict of interest is determined on a **case-by-case basis**, and any combination of the experiences or affiliations on the prior slide *may* constitute bias and/or conflict of interest, depending on the circumstances

# Conflicts of Interest: What are they?

The Department also declines to define conflict of interest and instead, leaves it in the discretion of the recipient.

# Conflicts of Interest: What are they?

- It is **not** a conflict of interest for the Title IX Coordinator to serve as the investigator.
- However, **it is** a conflict of interest for the investigator and/or the Title IX Coordinator to serve as the decision-maker or appeal decision-maker.

# Conflicts of Interest: What are they?

- It is **not** a conflict of interest for a recipient to fill Title IX personnel positions with its **own employees**
  - Recipients are not required to use outside, unaffiliated Title IX personnel. 85 FR 30252.
  - Any recipient, *irrespective of size*, may use existing employees to fill Title IX roles, “as long as these employees do not have a conflict of interest or bias and receive the requisite training[.]” 85 FR 30491-92.
  - Even a student leader of the recipient may serve in a Title IX role. 85 FR 30253.

# Serving Impartially

**Avoid** prejudgment of the facts at issue, conflicts of interest, and bias

&

**Don't** rely on sex stereotypes

# Avoiding Prejudgment of the Facts at Issue

- Cannot **pass judgment** on the allegations presented by either party or witnesses
- Cannot **jump to any conclusions** without fully investigating the allegations and gathering all of the relevant facts and evidence from all parties involved.

# Avoiding Prejudgment of the Facts at Issue

Regulations necessitate a broad prohibition on *sex stereotypes*

Decisions *must* be based on individualized facts, and not on stereotypical notions of what “men” and “women” do or not do

85 FR 30254

# Avoiding Prejudgment of the Facts at Issue

- The Department **permits** institutions to apply **trauma-informed practices**, so long as it does not violate the requirement to serve impartiality and without bias
- It is possible, “albeit challenging,” to apply trauma-informed practices in an impartial, non-biased manner
- Any trauma-informed techniques must be applied equally to all genders

85 FR 30256, 30323

# Avoiding Prejudgment of the Facts at Issue

- Any and all stereotypes about men and women must be checked at the Title IX door.
  - Leave behind any prior experiences, whether that be from past Title IX proceedings or personal experiences.
- Approach the allegations (of both parties) with neutrality at the outset
- Treat both parties equally and provide an equal opportunity to present evidence, witnesses, and their versions of the story.

# Avoiding Prejudgment of the Facts at Issue

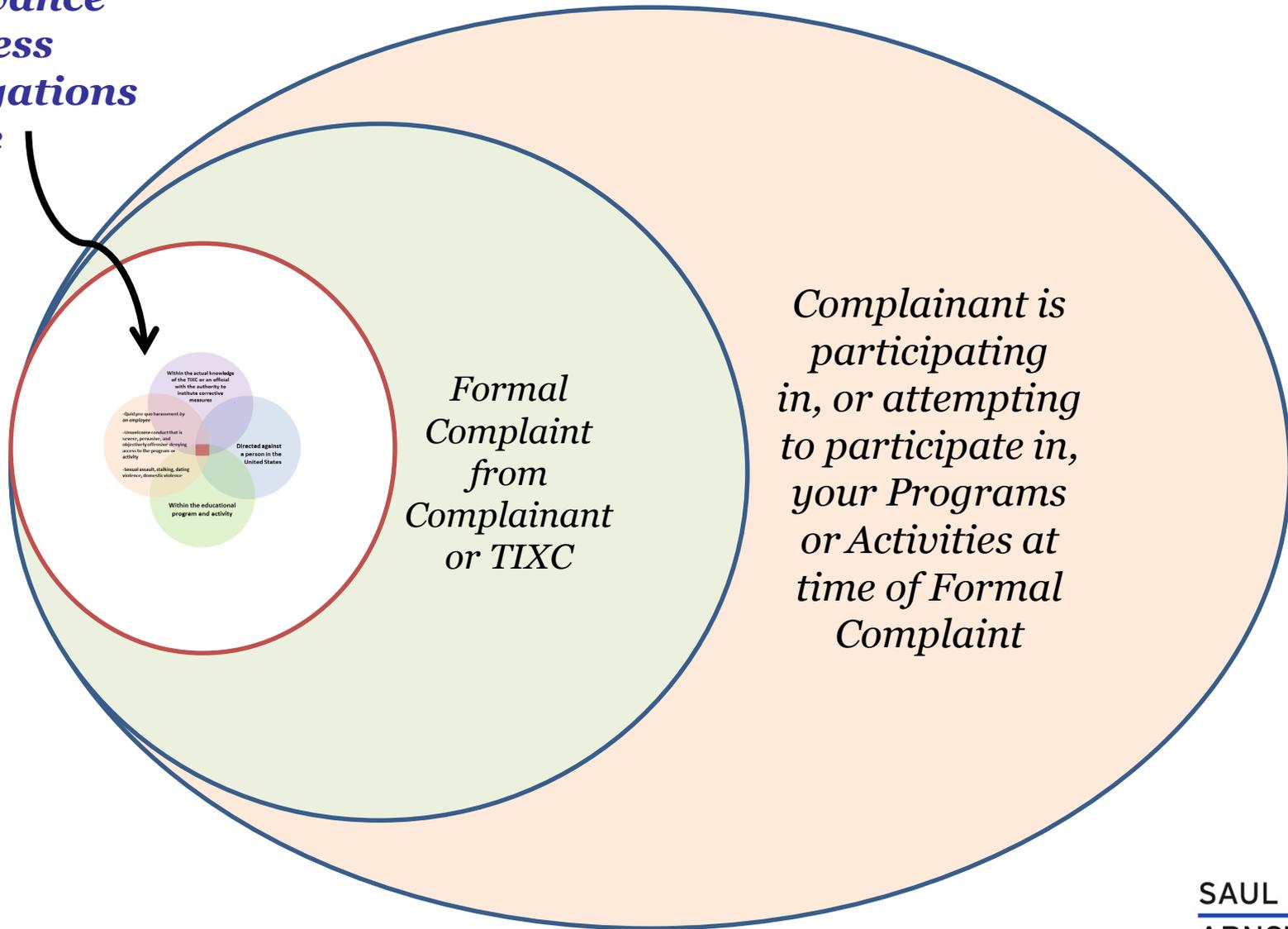
**Bottom Line:** The fact that an individual is “male”, “female”, or “non-binary” should not, and cannot, have any bearing on the credibility of the party or witness or how Title IX personnel approach the situation.

*The Regulations*

# THE GRIEVANCE PROCESS

SAUL EWING  
ARNSTEIN  
& LEHR<sup>LLP</sup>

**§106.45  
Grievance  
Process  
Obligations  
Arise**



# Formal Complaint

## What is Formal Complaint?

“[A] document

- filed by a complainant or signed by the Title IX Coordinator
- alleging sexual harassment against a respondent and
- requesting that the recipient investigate the allegation of sexual harassment.”

§ 106.30

# Formal Complaint

In other words, **complainant must assent** or the **Title IX Coordinator must believe it is necessary**.

- “The formal complaint requirement ensures that a grievance process is the result of an intentional decision on the part of either the complainant or the Title IX Coordinator.”

85 FR 30130

# Formal Complaints: Mandatory Dismissal

- When a Formal Complaint is filed, the Title IX Coordinator **evaluates** the Formal Complaint
- If one (or more) of the following conditions is **not met**, the Title IX Coordinator **must dismiss** the Formal Complaint for Title IX purposes:
  - Conduct alleged, if true, does not meet § 106.30 sexual harassment definition;
  - Conduct alleged did not take place within the University's educational program or activity;
  - Conduct alleged is not perpetrated against a person in the United States; **or**
  - At time of filing Formal Complaint, Complainant is not participating in or attempting to participate in the University's programs or activities

# Formal Complaints: Discretionary Dismissal

- If one (or more) of the following conditions is **not met**, the Title IX Coordinator may dismiss the Formal Complaint for Title IX purposes:
  - Complainant withdraws Formal Complaint or allegations in writing;
  - Respondent is no longer enrolled or employed by the University; or
  - Specific circumstances prevent the University from gathering evidence sufficient to reach a determination regarding responsibility.

§ 106.45(b)(3)(ii)

# Formal Complaints: Notice & Opportunity to Appeal

## Dismissal Notice & Right to Appeal

- Upon a mandatory or discretionary dismissal, the University must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties. 106.45(b)(3)(iii).
- Both parties must be provided equal right to appeal a dismissal decision. 106.45(b)(8).

# Formal Complaint: Consolidation

- University **may consolidate** multiple Formal Complaints (§ 106.45(b)(4))
  - Same facts or circumstances involving multiple respondents or multiple complainants
  - Allegations of conduct that are temporally or logistically connected
- University **may consolidate** or **refer** allegations implicating other policies

# The Investigation

The University **must investigate** allegations in a **Formal Complaint**

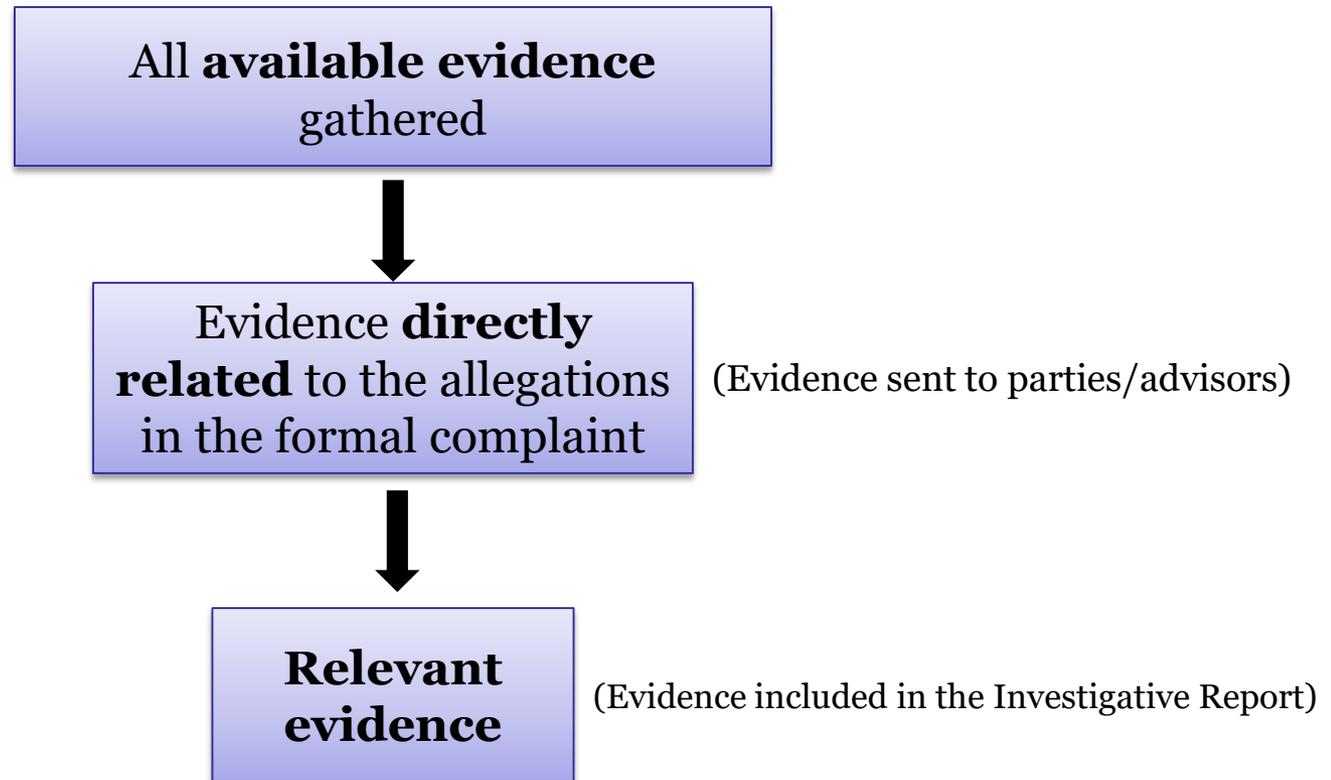
- *Remember: Formal Complaints request that the “recipient investigate the allegation of sexual harassment.”*

§ 106.30

# The Investigation

- Must provide equitable opportunities to all parties, including:
  - Opportunity to be accompanied to all meetings, conferences, and hearings by an advisor of choice
  - Opportunity to participate, or not, in any portion of the investigation

# The Investigation



# The Hearing

- Live
  - See & hear
  - May be “virtual”
- With Cross-Examination
- Results in a determination of responsibility

# The Hearing Officer

- *Hearing officer* designated to preside over the hearing.
- Responsibilities:
  - *Make relevance determinations on evidence and cross examination questions at hearing*
  - *Ask questions of parties and witnesses to support a determination by a preponderance of the evidence as to what happened*
  - *Determine whether the Policy was violated*

# Cross-Examination

**Cross-examination**: Advisor asks other party and witnesses **relevant questions** and follow-up questions, including those challenging credibility

# Cross-Examination

- Decision-maker must permit each party's **advisor** to **conduct cross-examination** of the other party and all witnesses
- Cross-examination may **not** be conducted by the parties themselves (only advisors)
- If a party does not have an advisor present at the hearing to conduct cross-examination, the institution **must provide an advisor** without fee or charge

# Role of Advisor

- Cross “on behalf of that party” is satisfied where the advisor poses questions on a party’s behalf. 85 FR 30340.
- Regulations impose no more *obligation* on advisors than relaying a party’s questions to the other parties or witnesses. 85 FR 30341.



# Role of Assigned Advisor

- Assigned advisors are not required to assume that the party's version of events is accurate, but still must conduct cross-examination on behalf of the party. 85 FR 30341.

# Relevance & Mechanics of Questioning

- Questions asked → Must be **relevant**
  - “Ordinary meaning of relevance.” 85 FR 30247, n. 1012.
- Decision-maker determines whether question is relevant
  - And must explain its reasoning if a question is deemed not relevant. 85 FR 30343.

# What is Relevant Evidence?

**rel·e·vant** | \ 're-lə-vənt \ adj.

**a:** having significant and demonstrable bearing on the matter at hand

**b:** affording evidence tending to prove or disprove the matter at issue or under discussion

// *relevant* testimony

# Relevance Determinations

- The following evidence is always considered “**irrelevant**” (or otherwise not admissible):
  - Any party’s medical, psychological, and similar treatment records without the party’s voluntary, written consent;
  - Any information protected by a legally recognized privilege without waiver;
  - Complainant’s prior sexual behavior (subject to two exceptions) or sexual predisposition; and
  - Party or witness statements that have not been subjected to cross-examination at a live hearing.

85 FR 30293 n. 1147

# Rape Shield Provision

- Prohibits questions or evidence about a complainant's prior **sexual behavior**, with two exceptions. *See* 34 CFR § 106.45(b)(6).
- Deems all questions and evidence of a complainant's **sexual predisposition** irrelevant, with no exceptions. *See* 85 FR 30352.

# Rape Shield Provision

- There are two exceptions where questions or evidence of past sexual behavior are allowed:
- **Exception 1:** Evidence of prior sexual behavior is permitted if offered to prove someone other than the respondent committed the alleged offense.

# Rape Shield Provision

- **Exception 2:** Evidence of prior sexual behavior is permitted if it is specifically about the complainant and the respondent **and** is offered to prove consent. 34 CFR § 106.45(b)(6).
- Does not permit evidence of a complainant's sexual behavior with anyone other than the respondent.

# Hearsay

- If a party or witness does not submit to cross-examination at the live hearing, then the **decision-maker cannot rely on ANY statement** of that party or witness in reaching a determination regarding responsibility.
  - *If a party's advisor asks a relevant question of another party or a witness, and the party/witness declines to respond to the question, then the decision-maker is precluded from relying on any statement made by that party or witness.*

# Hearsay

- Statement
  - Ordinary meaning
  - **A person's intent to make factual assertions**

# Hearsay

- Hearsay prohibition **does not apply** if the Respondent's statement, itself, constitutes the **sexual harassment at issue**.
  - The verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment because the statement itself is the sexual harassment.

# Hearsay

- Hearsay prohibition **does not apply** to a party or witness' refusal to answer questions ***posed by the decision-maker***. 85 FR 30349.
  - So, a party's failure or refusal to answer a question posed by the decision-maker does not prohibit the decision-maker from relying on the party's statements.

# Hearsay

- Decision-makers cannot draw an inference as to responsibility based on a party or witness's refusal to answer.
- Prohibition against drawing inferences applies when a party or witness refuses to answer cross-examination questions posed by a party advisor or refuses to answer questions posed by a decision-maker

*The Hearing Decision-Maker's Determination*

# THE OUTCOME

# Outcome Determination

**At the conclusion of the hearing, the decision-maker must issue a written determination of responsibility**

# Written Notice of Outcome

## ***Contents:***

1. Identification of the **allegations** potentially constituting Sexual Harassment;
2. A description of the **procedural steps** taken from the receipt of the Formal Complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
3. **Findings of fact** supporting the determination;
4. **Conclusions** regarding the application of this Policy to the facts;
5. A statement of, and rationale for, the result as to each allegation, including a **determination regarding responsibility**;
6. Description of any **sanctions** imposed on the Respondent and **whether remedies** designed to restore or preserve equal access to the university's education Programs or Activities will be provided to the Complainant; and
7. Information about the **appeal** process.

# Written Notice of Outcome – Sanctions and Remedies

The written determination **must** include a statement of, and rationale for, the result as to each allegation, including any **disciplinary sanctions imposed on the respondent**, and *whether* **remedies** will be provided by the recipient **to the complainant**. §106.45 (b)(7)(ii)(E).

# Written Notice of Outcome

- Title IX Coordinator provides the written determination to the parties **simultaneously**.
- The determination regarding responsibility **becomes final** either on the date that the University provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

106.45(b)(7)(iii)

*After the Hearing & Notice of Decision*

# **APPEALS**

# Mandatory & Equal Appeal Rights

- University must offer both parties an appeal from a **determination regarding responsibility** and from an institution's **dismissal of a formal complaint** or any allegations therein (whether or not it is a mandatory or discretionary dismissal).  
§106.45(b)(8)(i)
- Parties must have an **equal opportunity** to appeal any dismissal decision

§ 106.45(b)(8)(i)-(ii)

# Grounds for Appeals

- The University **must offer both parties** an appeal on the following bases:
  - Procedural irregularity that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
- The University **may offer** an appeal equally to both parties on additional bases.

§ 106.45(b)(8)(i)-(ii)

# Requirements for Appeals

## Requirements for Appeals:

- Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties (TIXC);
- Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
- Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome [of the initial determination];
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide the written decision simultaneously to both parties.

§106.45(b)(8)(iii)